CITATIONS

CASES:

United States Supreme Court Cases

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 103

JOE NATHAN COOPER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the District Court of Appeal (R. 257) and the order of the Supreme Court of California denying a hearing (R. 276) are reported at 234 Cal.App.2d 587 and 44 Cal.Rptr. 483.

Jurisdiction

The judgment of the District Court of Appeal was entered May 24, 1965. (R. 257.) The order of the Supreme Court of California denying a hearing was entered July 21, 1965. (R. 276.) The petition for a writ of certiorari

was filed September 20, 1965 and granted April 18, 1966. (R. 277); 384 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

1. Did the California District Court of Appeal correctly hold that the piece of brown sack paper was seized unconstitutionally in a warrantless search of defendant's impounded car a week after his arrest and used unconstitutionally as evidence at petitioner's trial in violation of *Mapp v. Ohio*, 367 U.S. 643 (1961)?

2. Is there a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction?

3. Can the unconstitutional use in a criminal trial of unconstitutionally seized evidence be dismissed as only harmless error?

4. Was petitioner unconstitutionally denied his right of confrontation and cross-examination because the prosecution based its case on assertions and conduct of an unreliable and untrustworthy informer without producing the informer as a witness at the trial?

Constitutional Provisions Involved

1. *United States Constitution*

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ."

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

2. *California Constitution, Article VI, Section 4½*

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Statement

About a week after defendant was arrested for allegedly selling two bindles of heroin to a police informer, a state narcotics agent made a warrantless search of defendant's car.[1] The search was made while the car was impounded.

[1] The District Court of Appeal's description of the car as defendant's car (R. 261-267) is adopted for convenient reference in this brief because defendant, although not the legal title holder, was the regular possessor of the car at the time of his arrest. (R. 260, 225-226, 209.) See *People* v. *Gale*, 46 Cal.2d 253, 257, 294 P.2d 13

During the search, the agent seized from the glove compartment a piece of brown sack paper, which was somewhat larger than but otherwise similar to the brown sack paper in which the bindles of heroin were wrapped. The District Court of Appeal ruled that the search and seizure were unconstitutional. (R. 263-67.)

At defendant's trial, the unconstitutionally seized sack paper was placed in the same prosecution exhibit (No. 4) as the two bindles of heroin and their sack paper wrapping and admitted in evidence over defendant's objection that a proper chain of possession had not been shown. The District Court of Appeal ruled that the paper was erroneously admitted in violation of *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (R. 267), and that defendant's failure to raise the search and seizure point at the trial did not bar him from raising this point on appeal because there had been a change in the law between the time of trial and appeal. (R. 267-269.)

The principal additional question in the District Court of Appeal was whether the unconstitutional use of the unconstitutionally seized evidence could be dismissed as only harmless.

The California Attorney General conceded and argued in his brief before the District Court of Appeal that "In our case, the brown paper was also highly relevant since it was of the same type used to wrap the two bindles of heroin sold to the informer, and was also similar to the wrapping

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(1956); *People* v. *Martin*, 45 Cal.2d 755, 290 P.2d 855 (1955); *Preston* v. *United States*, 376 U.S. 364 (1964); *Jones* v. *United States*, 362 U.S. 257, 265 (1960); *Stoner* v. *California*, 376 U.S. 483, 490 (1964); *Chapman* v. *United States*, 362 U.S. 257, 265 (1960); *Mapp* v. *Ohio*, 367 U.S. 643, 659, n. 9 (1961).

on the object Cooper jammed into his mouth and swallowed." (R. 254.)

The District Court of Appeal, however, ruled that the violation of the United States Constitution could be dismissed as harmless because other evidence "establishes the sale by sufficient circumstantial evidence" and because "this chain of circumstances has its own factual integrity." (R. 270.)

Other relevant facts clearly establish that the use of the unconstitutionally seized evidence was prejudicial. They also show that defendant was denied his right of confrontation. Those facts are set forth in detail in the Court's opinion (R. 257-262, 272-273) and the record; they may be summarized as follows:

In early December 1961, federal agents began making transcriptions of an informer's calls to defendant's residence. (R. 192-193.) Federal agents, state agents, and local police thereafter set up a controlled narcotics transaction between an admittedly unreliable informer (R. 127, 59-60) and a man who "appeared" to be defendant.[2] (R. 257-260.)

The informer was arrested about dawn on December 21, 1961, for selling heroin. He was searched, taken to the Richmond, California police station, and interrogated for several hours. He agreed to act as an informer and was searched again at the police station, furnished with $20.00 in marked money, and taken by state agent Armenta and

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[2] The police tactics used and similar tactics are described generally in Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U.Chi.L.Rev. 137, 154-158 (1963).

federal agent Lee to a downtown phone booth where he called defendant's residence. (R. 257-58.) The informer asked the woman who answered for "Joe," and when "Joe" answered, the informer said "How about a deuce." "Joe" said "yes" and the informer suggested they meet at a particular market. (R. 258.) Agent Armenta listened in on a twin phone; he later testified at the trial that he recognized defendant's voice and that "deuce" refers to bindles of heroin. (R. 258.)

Federal Agent Yates and police officer Stumpf had been observing, from about a block away, the house where defendant lived with his aunt, and shortly after the phone call, officer Stumpf "saw a person that fit the description" of defendant leave the house and drive off in a 1957 blue Oldsmobile in the direction of the market. (R. 258.)

Meanwhile, Agent Armenta and the informer had been dropped off by Agent Lee and were heading on opposite sides of the street for the market parking lot. (R. 258-259.) Two additional officers, Agent Groom and Lieutenant Sullivan, took up stations across the street. (R. 259.)

The officers' idea was to keep the informer and the suspect under continual observation by Armenta, Groom, and Sullivan from three different points. Agent Armenta said he saw defendant drive into the parking lot in a 1957 blue Oldsmobile but that he lost sight of the informer for about 2-3 minutes. (R. 259.) He did not testify to any meeting between the informer and the suspect. Agent Groom stated that from about 100 yards away (R. 167) he recognized the car as one defendant "usually drove" (R. 260) and saw the informer go up to the driver's side of the car and talk to a man in it who "appeared" to be defendant. (R. 259-260.)

Lieutenant Sullivan, who was about the same distance away from the parking lot as Agent Groom (R. 148), also said that the man in the car "appeared" to be defendant but that the informer sat inside the car on the front seat. (R. 260.) There were occasions when Agent Groom could not keep the informer in view (R. 122) and when Lieutenant Sullivan's view was partially obstructed by parked and passing cars. (R. 150.)

The informer returned to agent Lee's car, told agent Lee that he had the "stuff," and turned over two bindles of heroin wrapped in a brown paper packet. (R. 157, 260.)

A field test was made on the contents of the package, indicating that the substance was possibly an opium derivative. After the test was made the officers attempted to locate defendant's car. (R. 260.)

Defendant, while in the company of a woman and two children, was arrested by federal agent Yates about 3-4 hours later the same afternoon. (R. 88, 89, 113, 260.) Yates was accompanied by four other officers, including agent Groom. (R. 260.) In a scuffle following the arrest, defendant removed an object wrapped in brown paper from his shirt pocket and tried to put it in his mouth. Groom tried stubbornly but unsuccessfully to stop him and his finger was bitten by defendant in the process. (R. 261.) Defendant was then pressed to the hood of the car and taken to the police station. (R. 261.)

On the day following his arrest, defendant was interrogated by six officers. During the interrogation he said he was sorry about Groom's finger but thought he was being choked, and that he had been chewing a marijuana cigarette wrapped in brown paper. (R. 272-274.)

Defendant's car was seized and impounded and subjected to the above-described unconstitutional search and seizure one week after the arrest, not incident to the arrest, without a warrant, and in violation of *Preston* v. *United States*, 376 U.S. 364 (1964). (R. 261, 263-267.)

Defendant was thereafter indicted for selling heroin to the informer and for assaulting agent Groom.[3]

At the trial, the various agents and officers testified to their observations and about the informer's conduct. The trial court also admitted in evidence the testimony by federal agent Lee that when the informer returned to Lee's car, Lee asked him "if he had the stuff, at which time he said yes and he handed me a brown paper packet." (R. 157, 260.)

The informer was not produced as a witness. (R. 262.)

The marked money was never found and no other heroin was found despite thorough searches of defendant, his car, his female companion, his clothing, and his room. (R. 261.)

Defendant took the stand in his own behalf, denied negotiating a sale or selling heroin to the informer (R. 262), stated that he had fought with the informer about two weeks previously (R. 209-211), and that at the times in question

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[3] An amended indictment filed at the trial also charged defendant with a prior felony conviction for drunk driving and a prior conviction for selling marijuana. (R. 28-30, 237-239, 257.) The priors were admitted. (R. 257, 241-242.) The statute under which defendant was charged with sale of heroin provides that upon a defendant's conviction and his admission of one prior narcotics offense, "he shall be imprisoned in a state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison." Calif. Health & Saf. Code §11501.

he was Christmas shopping and visiting with the woman and two children in whose company he was arrested. (R. 212-214.)

Defendant was convicted on both counts. His conviction was affirmed by the District Court of Appeal.[4]

Defendant petitioned the California Supreme Court for hearing and raised the additional question, based on the then newly decided case of *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the prosecution's use of testimony based on assertions and conduct of the informer without producing him as a witness had denied to defendant his right of confrontation. (Cert. Rec. item 23, pages 3-4, 17-21.) The petition for hearing was denied.

Defendant then petitioned for the writ of certiorari that has brought the case here. (R. 277.)

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[4] In addition to the rulings summarized at the beginning of the Statement, the District Court of Appeal ruled: (1) The controlled narcotics buy did not violate *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Massiah* v. *United States*, 377 U.S. 201 (1964). (2) The evidence of assault was sufficient to dispute defendant's claim that he had a right to prevent forcible extraction of material from his mouth. (3) Various statements obtained during the police interrogation without prior warning were inadmissible but harmless or admissible because exculpatory. (4) Agent Armenta's use of a twin phone listening device on the informer's phone call did not violate the Federal Communications Act or state law. (5) There was probable cause to arrest defendant. (6) The trial court's observations in ruling on defendant's motion for acquittal did not deny defendant a fair trial. (7) An allegedly illegal search of defendant's room was consented to and in any event produced no evidence. (8) The prosecutor was not guilty of prejudicial misconduct. (9) Defendant was ably represented at trial. (R. 272-275.)

Summary of Argument

The California District Court of Appeal correctly held that the piece of brown sack paper obtained in a warrantless search of defendant's car was unconstitutionally seized and unconstitutionally used as evidence at the trial.

The court below, however, was mistaken in dismissing the unconstitutional error as harmless. The unconstitutionally seized piece of sack paper was a vital link in the prosecution's case against defendant and at the very least, there is a reasonable possibility that it contributed to the conviction. Under *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), therefore, the judgment must be reversed.

The judgment below must be reversed for the further reason that the unconstitutional use in a criminal trial of unconstitutionally seized evidence cannot be dismissed as only harmless error. The rule of reversal of the coerced confession and other cases involving violations of constitutional or important statutory rights is controlling. Unconstitutionally seized evidence is "tantamount to coerced testimony," *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961), and no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. *Wong Sun* v. *United States*, 371 U.S. 471, 485-486 (1963). The notion that reversals will deter lawless police conduct or protect constitutional rights more in testimonial evidence cases than in real evidence cases is irresponsible. Reversal for unconstitutional error is a small cost for enforcement of the United States Constitution.

Finally, the judgment below must be reversed because the prosecution based its case on the assertions and con-

duct of an unreliable and untrustworthy informer without producing the informer at the trial and thereby denied defendant his crucial right of confrontation and cross-examination.

ARGUMENT

I. The California District Court of Appeal Correctly Held That the Piece of Brown Sack Paper Was Unconstitutionally Seized in a Warrantless Search of Defendant's Car a Week After His Arrest and Unconstitutionally Used as Evidence Against Him at the Trial.

The California District Court of Appeal held that Agent Groom's warrantless search of defendant's impounded car a week after the arrest and his seizure of a brown piece of sack paper from the glove compartment was a violation of defendant's "vital Fourth Amendment rights" and that under *Mapp* v. *Ohio*, 367 U.S. 643, 655-657 (1961), the paper was inadmissible. (R. 263-67.)

The court's holding is correct: The search was made without a warrant a week after defendant had been arrested and taken in custody. The car had been taken to the garage. There was no danger of concealed weapons, of destruction of evidence, or of removal of the vehicle from the locality. It follows that "the search was too remote in time or place to have been made as incidental to the arrest and . . . : that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." *Preston* v. *United States*, 376 U.S. 364, 368 (1964). The use of such evidence at the trial

was therefore unconstitutional. *Mapp* v. *Ohio*, 367 U.S. 643, 655-57 (1961).[5]

II. The Unconstitutionally Seized Piece of Brown Sack Paper Was a Vital Link in the Prosecution's Case Against Defendant; at the Very Least, There Is a Reasonable Possibilty That It Contributed to Defendant's Conviction. The Judgment Must Therefore Be Reversed.

In *Fahy* v. *Connecticut*, 375 U.S. 85 (1963) this Court found it unnecessary "to decide whether the erroneous admission of evidence obtained by an illegal search and

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[5] Two further arguments made by the respondent to the District Court of Appeal are now foreclosed by the decision of that court: First, the argument that defendant failed to object on search and seizure grounds is foreclosed because the court held that an objection would have been futile (R. 267-269) and decided the constitutional issue on the merits: See, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("there can be no question as to the proper presentation of a federal claim when the highest state court passes on it"); *cf.* *Mapp* v. *Ohio*, 367 U.S. 643, 659, n. 9 (1961) (state procedural requirements governing assertion of constitutional challenges "must be respected"). Second, the argument, such as it is, that the constitutional rule of the *Preston* case can be undercut by a state vehicle forfeiture statute is foreclosed because the court removed any state law premises for this argument by holding that the statute in question neither purports to authorize nor authorizes warrantless searches of impounded cars. (R. 266.) The court's construction of its own state's statute is correct and controlling. See, *e.g.*, *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513 (1933); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 688 (1959).

The District Court of Appeal also effectively distinguished *Burge* v. *United States*, 333 F.2d 210, 218-19 (9th Cir. 1964), which upheld a search and seizure of evidence from an impounded car, as failing to even mention the *Preston* case and as not binding in any event. (R. 267.) The same distinction applies to the opinion of the Ninth Circuit on the rehearing of the *Burge* case. *Burge* v. *United States*, 342 F.2d 408, 414 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965). The Fourth Amendment will be served and a conflict between the Ninth Circuit and California courts eliminated by a specific disapproval of the *Burge* case.

seizure can ever be subjected to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error." 375 U.S. at 86. Fahy's conviction was reversed because the Court found that there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87.

The standard of the *Fahy* case is amply met in this case: There is not only a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction; in fact, the paper was "highly relevant", as the state admitted to the District Court of Appeal, and was a vital link in the prosecution's case.

The prosecution placed the unconstitutionally seized piece of brown sack paper in the same exhibit as the very items that defendant was prosecuted for selling, namely the two bindles of heroin and their wrapping of a smaller piece of brown sack paper. (R. 267-68). The inference plainly intended was that the bindles wrapped in brown sack paper and the larger piece of brown sack paper both came from the defendant. The Attorney General candidly conceded, and indeed argued, in the District Court of Appeal that the unconstitutionally seized piece of brown sack paper was "highly relevant since it was of the same type used to wrap the two bindles of heroin sold to the informer, and was also similar to the wrapping on the object Cooper jammed into his mouth and swallowed." (R. 254.) The district attorney at the trial was also at pains to forge the brown paper link. In addition to placing the paper in the same exhibit as the bindles, he made a point of establishing that the object defendant placed in his mouth at the time of his arrest was wrapped in brown paper. (R. 90, 99-100.)

The trial judge presumably considered all portions of the exhibit and the other brown paper evidence. Because he, as the fact finder, might have found an insufficient linking of defendant to the sale of heroin without the illegal evidence in the case, the Court "cannot be sure that the scales were not tipped in favor of conviction by reliance upon the inadmissible" and highly relevant piece of brown sack paper. See *Wong Sun* v. *United States*, 371 U.S. 471, 492-93 (1963).

The unconstitutionally seized piece of brown sack paper was not only highly relevant in its own right, it was of crucial importance to a case that otherwise contained the following extensive weaknesses and conflicts:

1. The prosecution did not produce the informer as a witness at the trial. (R. 262.) The informer was the only person who could positively identify the suspect who supposedly sold him heroin.

2. The informer was admittedly unreliable (R. 127) and the police had no basis for believing him to be honest or trustworthy. (R. 59-60.) By virtue of his previous fight with defendant (R. 209-211) and his agreement with the police resulting in a reduced charge (R. 127-128) the informer easily could have been motivated to falsely accuse defendant.

3. The marked money given to the informer was not found despite thorough searches of defendant, his car, his room, and his female companion. (R. 261.)*

* In administering the "affirmative trap" in narcotics cases, even the police are likely to view a first sale as "faulty from an evidentiary point of view" if the marked funds are not found. See Comment, *Administration of the Affirmative Trap*, 31 U.Chi.L.Rev. 137, 156 at n. 83 (1963).

4. The three officers who were supposed to keep the informer and the suspect under observation could not and did not do so:

(a) Agent Armenta admitted that the informer was out of his view during the crucial 2-3 minutes of the purported meeting between the informer and the suspect. (See R. 259, 64, 72, 74-75.)

(b) Agent Groom's and Lieutenant Sullivan's stories conflicted: Agent Groom said that the informer walked up to and stood by the driver's side of the suspect's car. (R. 260.) Lieutenant Sullivan said that the informer approached the car and sat inside it on the passenger side. (R. 260.)

(c) Agent Groom and Lieutenant Sullivan were more than a football field length away from the market parking lot in which the sale of heroin supposedly took place and there were obstructions to their view. (R. 167, 121-22, 148, 150.)

5. The suspect in the car with the informer was never positively identified as the defendant by any one of the six officers involved in the case:

(a) Officer Stumpf said only that the suspect who got into the car that went to the parking lot "fit the description of" defendant, "had the same build" and limped. (R. 258, 184.)

(b) Agent Yates said that the suspect was a "large male subject" (R. 188) with "a fairly normal walk." (R. 190.)[7] He did not see the suspect's face. (R. 189.) Al-

[7] Agent Yates' and Officer Stumpf's conflicting testimony whether the man limped or walked fairly normally illustrates one of the danger signals of eye-witness identification, namely a discrepancy in the descriptions of physical characteristics. See Wall, Eye-Witness Identification in Criminal Cases, 97-101 (1965).

though he arrested defendant later in the afternoon (R. 88), he did not testify that defendant was the same "large male subject" he had seen earlier.

(c) Agent Armenta said that he saw a car driven by defendant approach the market area (R. 259), but did not testify to any meeting between defendant and the informer and admitted that he lost sight of the informer for 2-3 minutes. (R. 259.)

(d) Agent Groom stated that the occupant of the car in the market parking lot only "appeared" to be defendant. (R. 260.)

(e) Lieutenant Sullivan stated that the occupant of the car in the market parking lot only "appeared" to be defendant. (R. 260.)[8]

(f) Agent Lee did not attempt to identify defendant.

6. The foundations for the attempted identifications were unreliable:

(a) Officer Stumpf said that he had only seen defendant twice before on fleeting occasions. Both occasions were at night from a distance and on one occasion the man so identified was in a moving vehicle. (R. 183.)

(b) Agent Yates had never seen defendant before. (R. 190.)

(c) Agent Armenta had seen a driver in an unlighted car at night on a prior occasion and had been told by Agent Groom and another officer that the driver was defendant.

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[8] The testimony of the above officers illustrates another danger signal to eye-witness identification, namely that "the witness fails to make a positive trial identification." See Wall, *supra*, n. 7 at 128-30.

(R. 60-61.) He did not testify to any independent knowledge or other prior observation of defendant.

(d) Agent Lee did not see defendant until his arrest. (R. 159.)

(e) Agent Groom and Lieutenant Sullivan did not testify about the basis of prior knowledge, if any, of defendant.

7. Despite thorough searches of defendant, his car, and his room, the only heroin ever linked to a person who "appeared" to be defendant was turned over by an admittedly unreliable informer.

8. Defendant testified in his own defense and disputed the testimony of the prosecution witnesses.

Every prosecuting official participating in this weak case considered the paper vital. The police thought it was important to hunt for more evidence than their own observations because they sent Agent Groom out to make a warrantless search of defendant's car a week after his arrest. The piece of brown sack paper that Agent Groom seized from the glove compartment was important enough to describe to the grand jury that indicted defendant. (R. 16.) It was important enough for the prosecution to place it in the same exhibit as the bindles of heroin and to refer to the brown paper linked to the defendant. It was important enough to be considered as evidence in the trial court. And, the paper was important enough for the Attorney General to argue on appeal that it was "highly relevant."

The practical judgment of the prosecuting officials that the paper was a vital link in the case and would contribute

to petitioner's conviction would seem to carry more weight than the speculations on a cold record of the appellate court. As the California Supreme Court stated in another search and seizure case, there is no reason to "treat this evidence as any less 'crucial' than the prosecutor . . . treated it." *People* v. *Cruz,* 61 Cal.2d 861, 868, 40 Cal.Rptr. 841, 395 P.2d 889 (1964).

At the very least, in this case there is a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction. Therefore, under *Fahy* v. *Connecticut, supra,* the judgment must be reversed.

A. The California District Court of Appeal Erred in Holding that Fahy v. Connecticut Did Not Require Reversal of Defendant's Conviction.

1. *The District Court of Appeal failed to apply the Fahy test.*

The District Court of Appeal ruled that the "chain of circumstances" apart from the illegal evidence "has its own factual integrity" and that "it does not appear to us to be reasonably probable that a result more favorable to defendant would have been reached in the absence of the above error." (R. 270.)

A "factual integrity" or "reasonable probability" test is plainly inconsistent with the *Fahy* case.[9] Just as the

[9] Moreover, the reasonable probability test is inconsistent with the "material injury" test applied by the Connecticut Supreme Court and supported by the dissenting opinion in the *Fahy* case. A court could easily find that evidence "materially injured" a defendant without finding a reasonable probability that a different result would have been obtained if the evidence had been excluded. The

critical fact, under the *Fahy* case, is not the sufficiency of properly admitted evidence, so the critical fact in the instant case is not the "factual integrity" of the "chain of other circumstances" or whether a "reasonable probability" existed that a more favorable result would have been reached.

The District Court of Appeal's heavy reliance on four sufficiency of evidence cases[10] in support of its "factual integrity" holding further demonstrates that it did not follow the *Fahy* rule that "we are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87.

2. *To the extent the District Court of Appeal attempted to apply the Fahy test, it did so erroneously.*

The District Court of Appeal ruled as follows on the *Fahy* test:

> "Nor, assuming without deciding that, as defendant would have it, we are called upon to inquire whether 'there is a reasonable possibility that the evidence com-

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reasonable probability test imposes an almost impossible burden on an appellant whereas Connecticut's "material injury test" was stated by the dissenting opinion in the *Fahy* case to be "as strict as any possible federal standard" 374 U.S. at 95, n. 3. Accordingly, whatever support there may be for the Connecticut rule does not support the much less strict California rule applied in the instant case.

[10] *People* v. *Basler*, 217 Cal.App.2d 389, 394-97, 31 Cal.Rptr. 884 (1963); *People* v. *Robison*, 193 Cal.App.2d 410, 411-412, 14 Cal. Rptr. 181 (1961); *People* v. *Givens*, 191 Cal.App.2d 834, 838, 13 Cal.Rptr. 157 (1961); *People* v. *Wilkins*, 178 Cal.App.2d 242, 245, 2 Cal.Rptr. 908 (1960).

plained of might have contributed to the conviction' (Fahy v. Connecticut (1963) 375 U.S. 85, 86-87), are we of the opinion that such reasonable possibility here exists. Indeed, in the light of the entire record, including the compelling characteristics of the sale and pre-sale search, we are at a loss to understand what actual probative value this piece of an ordinary paper bag could possibly have, there being no testimony establishing that it was a piece of the same paper in which the heroin was wrapped." (R. 270.)

The essential weaknesses in the court's statement are:

(a) *Probative value*

The probative value of the large piece of brown sack paper in Exhibit 4 is independent of the other evidence in the case: The logical inference is that the two pieces of brown sack paper in Exhibit 4 came from the same source. This inference is not made any weaker by the existence of other evidence; it exists independently. Why did the prosecution place the illegally seized piece of brown paper in Exhibit 4 if it did not want the trial court to infer that the paper came from the same source as the heroin? This question is not answered by the Court. As mentioned earlier, however, the Attorney General candidly conceded in his brief that the illegally seized evidence was "highly relevant." (R. 254.) It was the only evidence apart from the officers' testimony, that linked defendant to the sale of heroin.

(b) *Lack of testimony*

The lack of testimony establishing that the illegally seized piece of paper was a piece of the same paper in which the

heroin was wrapped demonstrates rather than detracts from the prejudicial nature of the evidence: The prosecution was able to have the damaging inference drawn from the exhibit without being required to support that inference with any testimony. Because it is entirely possible that testimony, scientific or otherwise, might have contradicted the inference, the prosecution's tactic of letting the illegally seized piece of paper rest in the same exhibit with the wrapped bindles of heroin was particularly damaging.

(c) *Unfair burden on defendants*

The court's ruling will impose a substantial and unfair burden on defendants in future cases: If unconstitutionally seized evidence is admitted, as here, without prosecution testimony such as that deemed important by the court, defendants will be forced not only to establish the illegality of the search and seizure, but to produce evidence of and witnesses to testify to the damaging effect of the illegal evidence. If the claim of illegality is not sustained, the proof will have fortified the prosecution's case.

Can a defendant in a criminal case who pleads not guilty and claims innocence fairly be asked to defend himself by showing guilt?

B. The Appropriate Remedy Is to Reverse the Judgment of the District Court of Appeal With Directions to Reverse the Conviction.

The District Court of Appeal committed two fundamental errors: (1) It applied a local test of appellate review forbidden by the *Fahy* case. (2) It misapplied the *Fahy* test.

If the District Court of Appeal had simply applied its own local standard of appellate review and failed to apply

the *Fahy* test at all, respondent might urge that the District Court of Appeal should be allowed to apply the *Fahy* test on remand.

Such a remedy would unfairly prolong this case (defendant's trial and conviction took place more than 4 years ago) and would be futile because the District Court of Appeal has already attempted to apply and misapplied the *Fahy* test.

It is respectfully requested therefore, if the judgment of the District Court of Appeal is to be reversed on the grounds herein argued, that the reversal be accompanied with directions to reverse the conviction on the ground that, as a matter of law, a reasonable possibility exists that the unconstitutionally seized evidence contributed to defendant's conviction. See *Fahy* v. *Connecticut, supra,* 375 U.S. at 92 ("the conviction is reversed"); *Stoner* v. *California,* 376 U.S. 483, 490 and n. 8 (1964) ("the judgment must be reversed").[11]

III. The Unconstitutional Use in a Criminal Trial of Unconstitutionally Seized Evidence Cannot Be Dismissed as Only Harmless Error.

A. Introduction.

In 1963, the California Supreme Court held that the evidentiary offer and use of the bloody fragments of a check that the police had brutally clubbed and choked out of the defendant in violation of the United States Constitution were nothing more than harmless blunders by the prosecu-

[11] A reversal by an appellate court in California is "deemed an order for a new trial, unless the appellate court shall otherwise direct." Calif. Pen. Code §1262.

tion and the trial court. *People* v. *Parham,* 60 Cal.2d 378, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963), *cert. denied,* 377 U.S. 945 (1964).

Since the *Parham* case, there has been a parade of California cases sustaining convictions despite the use at trial of evidence unconstitutionally obtained in violation of the principles of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), as followed in *People* v. *Dorado,* 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, *cert. denied,* 381 U.S. 937, 946 (1965). The instant case is among them; others are described in Appendix A. In addition, many recent California cases, also described in Appendix A, sustain convictions despite unconstitutional comments on the defendant's failure to testify in violation of *Griffin* v. *California,* 380 U.S. 609 (1965). These cases depart sharply from the history, purpose, and long standing interpretations of California's harmless error rule. See Appendix B which sets forth the history of the harmless error rule in California. They go far beyond the idea that the states can develop "workable rules" to meet "the practical demands of effective criminal investigation and law enforcement." *Ker* v. *California,* 374 U.S. 23, 34 (1963). The California courts have even gone so far as to dismiss three separate violations in one case as harmless, *e.g., People* v. *Helms,* 242 A.C.A. 528, 536-538 (1966), and to hold harmless the erroneous admission in evidence of unconstitutionally obtained confessions. *E.g., People* v. *Jacobson,* 63 Cal.2d 319, 329-331, 46 Cal.Rptr. 515, 405 P.2d 555 (1965); *People* v. *Sheridan,* 236 Cal.App.2d 667, 670-671, 46 Cal.Rptr. 295 (1965). The infectious notion that violations of the United States Constitution can be dismissed as harmless is also spreading from *Parham* and its progeny to the federal courts, *e.g., Burge* v. *United States,* 342 F.2d

408, 413 n. 2 (9th Cir.), *cert. denied,* 382 U.S. 829 (1965), and to the courts of other states. *E.g., State* v. *Jones,* 410 P.2d 219, 221 (Ore. 1966); *Dean* v. *Fogliani,* 407 P.2d 580, 583 (Nev. 1965).

This trend of disregarding the United States Constitution must be stopped. It can be stopped by this Court's applying the accepted rule, applied in closely related cases, including the coerced confession cases, that unconstitutional error requires a reversal.

The "unconstitutional but only harmless" theory in illegally seized evidence cases is based on three premises: (1) The rule of reversal of the coerced confession cases is not controlling because such cases are in "a class by themselves" and because "almost invariably, . . . a confession will constitute persuasive evidence of guilt" whereas illegally obtained evidence may be "only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial." (2) The basic purpose of the exclusionary rule is to deter unconstitutional law enforcement; that purpose would not be served by requiring reversals for the use at trial of unconstitutionally seized evidence deemed unimportant to a conviction. (3) "To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial." *People* v. *Parham, supra,* 60 Cal.2d at 385-386.

The foregoing premises are fallacious and are answered in detail hereafter. In summary, the answers are:

(1) The coerced confession cases are not in a class by themselves. The rule of reversal of these cases and cases involving other constitutional or important statutory rights

is particularly applicable and controlling in illegal evidence cases. Illegally seized evidence is "tantamount to coerced testimony", *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961), and no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. *Wong Sun* v. *United States*, 371 U.S. 471, 485-486 (1963). The notion that reversals will deter lawless police conduct or protect constitutional rights more in testimonial evidence cases than in real evidence cases is illogical and irresponsible.

(2) Rejection of the "unconstitutional but only harmless" theory is necessary to deter lawless law enforcement and the unconstitutional use of illegal evidence. Policemen and prosecutors are properly interested in securing convictions of guilty defendants. They will respond to the stimulus of a reversal even if they will not otherwise respect constitutionally protected rights.

(3) Fear of judicial irresponsibility is not a proper foundation for a rule of constitutional law that allows violations of the Constitution to go unremedied. Judges who would uphold illegal police conduct to sustain the conviction of a guilty man will as easily find the use of illegally seized evidence to be "harmless" to accomplish the same goal. In either case, such judges would encourage lawless police conduct.

B. The Rule of Reversal of the Coerced Confession Cases and Cases Involving Other Constitutional or Important Statutory Rights Is Controlling in Illegal Evidence Cases.

1. *The rule of reversal in the coerced confession cases.*

If a coerced confession "is introduced at the trial, the judgment of conviction will be set aside, even though the

evidence apart from the confession might have been sufficient to sustain the jury's verdict." *Malinski* v. *New York,* 324 U.S. 401, 404 (1945); *Jackson* v. *Denno,* 378 U.S. 368, 376 (1964); *Lyons* v. *Oklahoma,* 322 U.S. 596, 597 n. 1 (1944); *Haynes* v. *Washington,* 373 U.S. 503, 518-519 (1963); *Stroble* v. *California,* 343 U.S. 181, 190 (1952); *Bram* v. *United States,* 168 U.S. 532, 540-542 (1897); *Brown* v. *Allen,* 344 U.S. 443, 475 (1953).

It was once held that if a jury rejected a confession as coerced, it could constitutionally base a conviction on other sufficient evidence, *Stein* v. *New York,* 346 U.S. 156, 188-194 (1952), but that holding has been overruled. *Jackson* v. *Denno,* 378 U.S. 368, 388-391 (1964). "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Rogers v. Richmond, 365 U.S. 534 . . . , and even though there is ample evidence aside from the confession to support the conviction." 378 U.S. at 376.

2. *The coerced confession cases are not in a class by themselves; the rule of reversal is applied in a wide variety of cases involving violations of constitutional and important statutory rights.*

The coerced confession cases are not in a class by themselves; the rule of reversal is applied in a wide variety of cases involving departures from "a constitutional norm or a specific command of Congress." See *Kotteakos* v. *United States,* 328 U.S. 750, 764-765 (1946). For example:

(a) When the accused is denied his constitutional right of counsel at a critical arraignment stage, the Court does

"not stop to determine whether prejudice resulted." *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961); *White* v. *Maryland*, 373 U.S. 59, 60 (1963).

(b) When the accused is denied his constitutional right to silence and to counsel in the police station, "no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Miranda* v. *Arizona*, 16 L.Ed.2d 694, 722 (1966). The Court "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.*, 16 L.Ed.2d at 720.

(c) When an accused is denied his right to the undivided assistance of counsel of his own choice, the Court will not "indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942); *cf. Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

(d) When one ground of a conviction "is invalid under the Federal Constitution, the conviction cannot be upheld" even if other valid grounds are established. *Stromberg* v. *California*, 283 U.S. 359, 368 (1931) (First Amendment); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942) (full faith and credit).[12]

(e) When an accused in a capital case is denied his Fifth Amendment right to a grand jury indictment, a reversal, indeed a dismissal of the information, is required because "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical

[12] Note that the *Stromberg* and *Williams* cases were relied on in *Lyons* v. *Oklahoma*, *supra*, as authority for the rule in confession cases. 322 U.S. at 597, n. 1.

departures from the rules." *Smith* v. *United States,* 360 U.S. 1, 9 (1959).

(f) When an accused is denied his right to 12 jurors and given only 11, a reversal is required because it is not the Court's "province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been." *Patton* v. *United States,* 281 U.S. 276, 292 (1930).

(g) When an accused is denied his right to an impartial judge, the conviction must be reversed "no matter what the evidence was against him." *Tumey* v. *Ohio,* 273 U.S. 510, 535 (1927).

(h) When the jury has heard a televised interview such as that in *Rideau* v. *Louisiana,* 373 U.S. 723, 727 (1963), the Court does "not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law . . . required a trial before a jury drawn from a community of people who had not seen and heard" the "interview".

(i) When a judge mistakenly charges a jury in terms of an unconstitutional presumption, the error will not be dismissed as harmless, no matter how positive "the belief of appellate judges in the guilt of an accused." *Bollenbach* v. *United States,* 326 U.S. 607, 615 (1946).

(j) When an accused is denied a federal statutory right to an instruction regarding his failure to testify, the error cannot be excused as harmless because the harmless error rule was "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.

Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him." *Bruno* v. *United States*, 308 U.S. 287, 294 (1939).

(k) When the prosecution makes knowing use of perjured testimony, the accused's claim to protection "is not to be defeated merely because there may have been other evidence, untainted, sufficient to warrant a conviction; . . . the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence, and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it." *Coggins* v. *O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.)[13]

Even in cases where important economic principles, and not personal liberties, are at stake, this Court has refused to add an additional test of prejudice to a showing that an important statute has been violated.[14]

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[13] *Cf. Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) which reversed a conviction because of the knowing use of false testimony even though the testimony went "only to the credibility of the witness." The court held that "it is upon such subtle factors as the possible interest of the witness in testifying falsely that defendant's life or liberty may depend." *Id.* at 269. "[T]he false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial." 360 U.S. at 272.

[14] For example:

(1) When an employer violated the statutory prohibition against interference with an employee plan of representation it made no difference that "a sweeping majority of the company's employees signified, by secret ballot, their satisfaction with the plan as revised in 1937 and their desire for its continuance," or that "prior to the

In addition to its application in a wide variety of cases, the rule of reversal for unconstitutional error also has the support of sound scholarly opinion. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in Federal Courts*, 3 Vill. L. Rev. 48 (1957).[15] See also Comment, *The Harmless Error Rule Reviewed*, 47 Colum. L. Rev. 450, 459-461 (1947). Even such a vigorous advocate of the harmless error doctrine as Wigmore recognized the crucial difference between the "ordinary rules of Evidence, which are mere instruments of investigation" and such constitu-

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adoption of the Wagner Act the plan did not run counter to any federal law, either in conception or administration." *NLRB* v. *Newport News Co.*, 308 U.S. 241, 248-249 (1939). "In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force." *Id.* at 251.

(2) "Price-fixing combinations which lack Congressional sanction are illegal *per se;* they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940). The application of this important principle provides a useful contrast to the treatment as harmless of the ordinary minor errors that cropped up in the same case. *Id.* at 234-249.

The United States Constitution is entitled to at least as vigorous enforcement as the labor laws and the anti-trust laws.

[15] "The beneficial effect of a summary reversal once error has been determined in these fundamental rights cases is unmistakable. The practice simplifies and expedites the review of criminal cases, for evidence obtained at the expense of constitutional or other basic guarantees is almost invariably prejudicial. But of primary importance, one can think of few better methods of discouraging subsequent infringement of cherished rights; further, affirming despite such constitutional violations might well be interpreted as a sanctioning of reprehensible evidence-gathering methods." 3 Vill.L.Rev. at 68.

tional rights as the rights to a jury trial and the right to a fair trial which "are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object." 1 Wigmore, Evidence 369 (3rd Ed. 1940).[16]

3. *The rule of reversal is controlling in illegally seized evidence cases.*

The rule of reversal is particularly applicable and controlling in illegally seized evidence cases. The unconstitutional seizure and evidentiary use of goods, papers, effects, and documents is "tantamount to coerced testimony." *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). Even before *Mapp* v. *Ohio, supra,* the admission of illegal evidence of arguably negligible value required a reversal. *Kremen* v. *United States*, 353 U.S. 346 (1957). Now that the exclusionary rule is recognized as a constitutional mandate, *Mapp* v. *Ohio, supra,* it would be anomalous to enforce it only when the illegal evidence is essential to conviction.

In applying the rule of reversal, as with the rule of exclusion, no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. *Compare Wolf* v. *Colorado*, 338 U.S. 25 (1949) and *Stein* v. *New York*, 346 U.S. 156, 192 (1953) *with Mapp* v. *Ohio*, 367 U.S. 643, 655-657 (1961) and *Jackson* v. *Denno*, 378 U.S. 368, 383-386 (1964). See *Wong Sun* v. *United States*, 371 U.S. 471, 485-486 (1963); *cf. McDonald* v. *United States*, 335 U.S. 451, 456-467 (1948)

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[16] Section 21 of 1 Wigmore, Evidence (3rd Ed. 1940) contains perhaps the most thorough discussion available of the history and purpose of the harmless error doctrine and an ample collection of cases from England, Canada and the United States.

(concurring opinion of Rutledge, J. applying coerced confession rule to illegal evidence). The notion, expressed by the California courts, that reversals will deter the unlawful extraction of testimonial evidence more than the unlawful seizure of real evidence is illogical and irresponsible. Fourth Amendment rights cannot be subjected to special conditions that are not imposed on any other "basic" constitutional right. For, if such conditions are imposed, "the right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society.'" *Mapp* v. *Ohio, supra,* 367 U.S. at 656.

There is, moreover, a compelling reason for applying the rule of reversal to illegally seized evidence cases: Under the mantle of "harmless error," *Mapp* v. *Ohio* will be eviscerated of meaning unless the state courts are prevented from dismissing unconstitutional errors thereunder as harmless, for it is perhaps an understatement to say that the Bill of Rights has not always been faithfully applied by state courts. See, Cahn ed., The Great Rights, *passim* (1963). The clear danger of upholding a conviction based upon a determination that a violation of an important right is harmless is that it becomes entrenched as a precedent, inviting future violation of the right.

The governing principle that must be enforced by this Court was stated in the foundation case of *Boyd* v. *United States,* 116 U.S. 616 (1886): The Constitution must be enforced, "though the proceeding in question is devested of the aggravating incidents of actual search and seizure." *Id.* at 635.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Ibid.*

The rule of reversal that enforces the guiding principle of the *Boyd* case in coerced confession cases is required no less in illegally seized evidence cases. Reversal would be required even in the following extreme example:

Suppose, in a possession of heroin case, that the prosecutor, by valid evidence, links possession of forty pounds of heroin to the defendant. Suppose also, that he has available illegally seized evidence that the defendant had possessed one ounce of heroin. Probably, the one ounce would not be used if the prosecutor's case is strong without it. But suppose it is used in just such a strong case. Should admission of the ounce in evidence be overlooked as "only harmless"? The answer is clearly no.

Advocates of the unconstitutional but only harmless error rule would urge that constitutional rights should depend upon the strength of the evidence that police and prosecutors produce and that the violation of the United

States Constitution should be overlooked because the legal evidence of guilt is overwhelming. They miss the point.

Lawless law enforcement must be deterred. The very fact that legal evidence is sufficient only makes the seizure and use of illegal evidence "more unwarranted because so unnecessary," *Haynes* v. *Washington,* 373 U.S. 503, 519 (1963).

Furthermore, the "harmless error" rule greatly increases the probability that illegal searches will be made and that illegally seized evidence will be introduced at trials in future cases, like defendant's, where the prosecution's case is of questionable strength. In such cases, the police will be tempted to search unconstitutionally for and seize even a scrap of paper, as in the instant case, to shore up weak cases against defendants they believe to be guilty or to obtain other evidence knowing that the defendant may have difficulty tracing the poisoned fruit to a poisoned tree. *Cf. Wong Sun* v. *United States,* 371 U.S. 471, 487-488 (1963). Prosecutors will be tempted, as in the instant case, to use such evidence to "button up" their cases, *cf. Coggins* v. *O'Brien,* 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.), because the state has no appeal from an acquittal. And, for the same reason, trial courts are apt to follow the suggestion (of then Attorney General, now Governor, Brown) that they resolve reasonable differences of opinion about admissibility of such evidence in favor of the state, see Note, *Two Years with the Cahan Rule,* 9 Stan. L. Rev. 515, 538 (1957), keeping at the same time "an eye to the saving grace of the" harmless error rule. See *People* v. *Black,* 73 Cal.App. 13, 43, 238 Pac. 374, 387 (1925). While an occasional conviction upon a weak case will undoubtedly be reversed because the finding of

"harmless error" will be overturned, many close cases will uphold convictions and almost all strong cases against defendants will be allowed to stand. As a result there will be no effective remedy for unconstitutional searches and seizures in a large number of cases. Many of these weak and close cases will be ones where a remedy for a possibly innocent man is most needed.

That violations of constitutional rights are encouraged by the harmless error rule is demonstrated by the frequency with which the appellate courts in California have found it necessary to invoke that rule. See Appendix A; *United States* v. *Rubenstein,* 151 F.2d 915, 924 (2d Cir.) (dissenting opinion of Frank, J.) *cert. denied,* 326 U.S. 766 (1945). The time to stop this trend is now. It can be stopped only by a decision of this Court that requires reversal of convictions whenever unconstitutionally seized evidence is unconstitutionally used at trial. Precedent and reason compel such a result.

C. Reversal for Unconstitutional Error Is a Small Cost for Enforcement of the Constitution.

The cost of reversal for unconstitutional error is a new trial. In return for this small cost, the defendant, the public, and the courts will receive the following substantial benefits:

(1) An accurate test by trial whether the defendant can be convicted on valid evidence alone.

The underlying assumption of the proponents of the harmless error rule is that there is sufficient legal evidence to convict. If they are right, let that assumption be tested by a new trial on valid evidence alone before a judge or

jury who will see and hear the evidence, not by an appellate court that must speculate on a cold record whether prejudice resulted.

(2) A powerful deterrent to police and prosecutors who seek to button up their cases by violating the Constitution.

(3) An elimination of the enormous cost, delay, and burden in appellate courts of reviewing the facts of every case in detail for the purpose of speculating whether an unconstitutional error was "prejudicial."

(4) A substantial reduction of the increasing, almost unmanageable, demands on the United States Supreme Court and the federal habeas corpus courts to review the cases of state prisoners.

(5) An end to the inevitable discrimination that occurs when a state court treats constitutional rights substantially differently from the federal court across the street and when similar cases on their facts are disposed of differently, some by reversal and some by affirmance, simply because of an appellate judge's speculations about the shadings of prejudice resulting from unconstitutional errors.

(6) A clear statement of principles for prosecutors to follow in appraising their cases.[17]

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[17] "Unhesitatingly he should refuse to go forward with the presentation of evidence which has been obtained by illegal police invasion of a private home. If his case *depends* upon such evidence, he should dismiss the prosecution. If he can present a case without the use of evidence illegally procured, it should not be offered. But if notwithstanding, he insists upon introducing evidence illegally gained through improper invasion of the sanctity of a dwelling, we should tell him once again and for all, we will reverse a conviction, as we now do." *Williams* v. *United States*, 236 F.2d 487, 491 (D.C. Cir. 1959) (concurring opinion of Danaher, J.).

(7) A fair trial for accused persons. As Judge Frank stated in one of his several important dissenting opinions on the subject of harmless error, delay and expense "are of far less importance than a fair trial. And they will be incurred infrequently because of errors if, by reversals in cases like this, we educate prosecutors and trial judges to prevent unfairness to a person on trial." *United States* v. *Rubenstein*, 151 F.2d 915, 924 (2d Cir.) (dissenting opinion of Frank, J.), *cert. denied*, 326 U.S. 726 (1945). See also *United States* v. *Liss*, 137 F.2d 995, 100 (2d Cir.), *cert. denied*, 320 U.S. 773 (1943); *United States* v. *Mitchell*, 137 F.2d 1006, 1011 (2d Cir. 1943) (dissenting opinions of Frank, J.)

D. Fear of Judicial Irresponsibility Is Not a Proper Foundation for a Rule of Constitutional Law That Allows Violations of the Constitution to Go Unremedied.

In *People* v. *Parham*, 60 Cal.2d 378, 386, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1964), the California Supreme Court applied its harmless error rule to unconstitutional evidence and reasoned that "to require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial."

The *Parham* reasoning is fallacious: Fear of judicial irresponsibility is not a proper foundation for a rule of constitutional law that allows violations of the Constitution to go unremedied. Only after thorough consideration did skepticism, not fear, about a jury's ability to isolate

exceedingly sensitive issues in confession cases, form part of the foundation for a rule of constitutional law, *Jackson* v. *Denno*, 378 U.S. 368, 388-391 (1964), and then only over strong dissent, 378 U.S. at 401-403, and only as a means to prevent violations of the Constitution, not to let them go unremedied. If there are judges who would uphold illegal police conduct to sustain the conviction of a guilty man, they will as easily find the use of illegally seized evidence to be "harmless" to accomplish the same goal. In either case, such judges would encourage lawless police conduct. These judges should not be encouraged by a rule that holds them harmless from their own consciences whenever they condone unconstitutional error.

E. There Is No Room for a Double Standard of Review in Illegal Evidence Cases, One for State Courts, the Other for Federal Courts.

In *Ker* v. *California*, 374 U.S. 23, 34 (1963), this Court held that the States are not "precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

An unconstitutional but only harmless error rule is not such a permissible local rule.

Workable rules in a limited framework for the police officer on the beat or in the patrol car who is concerned with an array of local crimes are one thing; a double stand-

ard for appellate judges in the quiet of their chambers is another. There is no criminal investigation or law enforcement need for permitting a state appellate court, any more than a federal appellate court, to dismiss unconstitutional error as harmless and no valid precedent for doing so. In *Lyons* v. *Oklahoma,* 322 U.S. 596, 597 n. 1 (1944), the federal rule of reversal in coerced-confession cases was so plainly applicable to the states that no discussion was necessary and the matter was disposed of in a footnote. And in *Fahy* v. *Connecticut,* 375 U.S. 85, 86 (1963), this Court assumed the applicability of a federal standard when it ruled that "on the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of harmless error' under the federal standard of what constitutes harmless error. Compare Ker v. California, 374 U.S. 23, 24 . . . ."

A double standard also is incompatible with federal habeas corpus review of unconstitutional errors in state proceedings: California denies habeas corpus relief to petitioners claiming an unconstitutional search and seizure regardless of whether their cases became final before *Mapp* v. *Ohio,* 367 U.S. 643 (1961) or after. *In re Sterling,* 63 Cal.2d 486, 47 Cal.Rptr. 205, 407 P.2d 5 (1965). Federal habeas corpus relief is available to post-*Mapp* petitioners, however, see *Linkletter* v. *Walker,* 381 U.S. 618 (1965), who have not deliberately bypassed available state procedures. *Fay* v. *Noia,* 372 U.S. 391, 438-439 (1963). Accordingly, a petitioner who presents to the federal habeas corpus court a record showing that a California appellate court has ruled that unconstitutional error occurred at his trial but that the error was dismissed as harmless will

have demonstrated his use of all available state procedures. If the federal writ is governed by a federal rule of reversal, the writ should issue because the unconstitutional error will be apparent from the record, see *Townsend* v. *Sain*, 372 U.S. 293 (1963), and a double standard will have resulted only in imposing a futile burden of review on the state appellate courts and an added burden on the federal habeas corpus courts. If, however, the federal writ is held to be unavailable if the state court correctly applied its harmless error rule, an even greater burden will be placed upon the federal courts because it will still be a federal question whether the unconstitutional error in fact was properly ruled harmless. See *Napue* v. *Illinois*, 360 U.S. 264, 271-272 (1959). Such a question cannot be answered without a factual review by the federal court, and not just a review on a limited factual issue such as the voluntariness of a confession, but a review on the entire record. Not even the double standard of *Wolf* v. *Colorado*, 338 U.S. 25 (1949) imposed such an unmanageable burden on the federal courts, and the twelve years of experience under that case teaches that another twelve year experiment is not in order.

F. There Is No Room for a Double Standard of Review in Illegal Evidence Cases, One for Court Trials, the Other for Jury Trials.

The California District Court of Appeal rightly made no point of the fact in the instant case that defendant was tried by a court rather than a jury. In recent California cases, however, the notion has sprung up that when a judge commits an unconstitutional error in admitting unconstitutionally obtained evidence, his error can be dismissed as harmless more easily if he, rather than a jury,

is the sole judge of guilt. This kind of reasoning has led to the affirmance of convictions despite the unconstitutional admission even of an unconstitutionally obtained confession. See *People* v. *Williams*, 239 A.C.A. 35, 37-38 (1965).

If this new notion leads respondent to argue the judge-jury distinction to this Court, the distinction should be disapproved, not only in this particular case for the reason that the question was not presented by respondent in the court below, but for illegal evidence cases generally, including this one, for the reason that the distinction is unsound.

The *Fahy* case was court not jury tried and yet this court applied no different standard. *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). See also *Rochin* v. *California*, 342 U.S. 165 (1951) (court trial). In a court trial, no less than in a jury trial, the appellate court "cannot be sure that the scales were not tipped in favor of conviction by reliance on the inadmissible" illegal evidence. *Wong Sun* v. *United States*, 371 U.S. 471, 493 (1963); see Note, *Improper Evidence in Non Jury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407 (1965). Accordingly, no distinction between court and jury trials of any constitutional dimension can or should be applied to the rule of reversal for unconstitutional error in admitting unconstitutionally seized evidence.

IV. Defendant Was Unconstitutionally Denied His Right of Confrontation and Cross-Examination Because the Prosecution Based Its Case on Assertions and Conduct of an Unreliable and Untrustworthy Informer Without Producing the Informer as a Witness at the Trial.

A. Defendant Was Unconstitutionally Denied His Right of Confrontation.

In *Pointer* v. *Texas*, 380 U.S. 400 (1965), the Court held (1) that the Sixth Amendment right to confront and cross-examine witnesses is applicable to the states by the Fourteenth Amendment and (2) that Pointer was denied this right when the Texas state court admitted in evidence, over objection, a transcript of the uncross-examined, preliminary hearing testimony of the defendant's victim, even though the witness had moved to California some time before the trial, did not intend to return to Texas, and was therefore beyond the subpena power of the prosecution. The Court stated that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." 380 U.S. at 407.

Defendant in the instant case was denied the opportunity to confront and cross-examine the key witness against him.

The trial court admitted in evidence, through the testimony of agent Lee, the crucial and uncross-examined statement of the participating informer, that "yes," he had the "stuff", and admitted federal agent Lee's testimony that the informer turned the stuff in a brown paper packet over to him. (R. 260; 157.) The trial court also admitted the testimony of the officers concerning every pertinent

movement of the informer from his arrest to his delivery of heroin to agent Lee. The informer's statement and the officers' testimony concerning his conduct were an essential part of the prosecution's case and the trial court was particularly influenced by the testimony as to the informer's conduct in turning over the bindles to agent Lee. (R. 208.)

The informer was not produced as a witness by the prosecution for confrontation and cross-examination. He was, however, a witness against defendant in every sense except for his absence at the trial: The implicit foundation of the prosecution's case, assuming that the prosecution acted forthrightly and honestly, was that the informer told them that defendant was in the car at the market parking lot: (1) If the informer had told the officers that someone else was in the car, the prosecution could not have been honestly maintained; this possibility must be rejected. (2) It is unrealistic and would attribute incompetence to the officers to assume that they did not question the informer as to the identity of the person in the car; this possibility must also be rejected. (3) It is also unrealistic to assume that the informer was not able to determine the identity of the person in the car; he knew defendant previously and was therefore able to determine whether the man in the car was defendant. (4) The only reasonable possibility remaining is that the informer told the officers that the person in the car was defendant. This assertion was particularly important because the officers' identification was equivocal; the officers did not positively identify the other man in the car at the lot as defendant but only that he "appeared" to be defendant.

Production of the informer as a witness for confrontation and cross-examination would have enabled defendant:

1. To test the informer's extra judicial assertions, express and implied, that the man he perceived in the car was defendant.

2. To test whether he was motivated to falsely imply by his assertions and by his conduct that the man in the car was defendant. *Cf.* Finman, *Implied Assertions as Hearsay,* 14 Stan. L. Rev. 682 (1962); Witkin, California Evidence, 239-40 (1958) (§214) ("the prevailing rule is . . . [that] if the conduct is offered in proof of some fact, in order to draw inferences as to the person's belief in the truth of that fact, the conduct is an *implied assertion* of the fact and just as objectionable as an express assertion"). The danger that the informer was motivated to falsely accuse defendant was substantial because of his unreliability and untrustworthiness (R. 127, 59-60), his obvious interest in cooperating with the police to secure the reduction in his own charge (R. 127-128) and his prior fight with defendant. (R. 209-211.)

3. To determine whether a defense of entrapment existed and, if so, to lay the basis for that defense without admitting guilt. See *People* v. *Perez,* 62 Cal.2d 769, 775-776, 44 Cal.Rptr. 326, 401 P.2d 934 (1965). See also *Sherman* v. *United States,* 356 U.S. 360 (1958).

4. To explore the possibility that "police pressure brought to bear to persuade [him] to turn informer" after several hours of interrogation was outside any "limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect." *Lopez* v. *United States,* 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren).

5. To obtain and examine any relevant prior statements the prosecution had obtained from the informer because he would then have been a prosecution witness. See *People* v. *Chapman*, 52 Cal.2d 95, 98, 338 P.2d 428 (1959) (statements of prosecution witnesses relating to the subject matter of their testimony).

Many of the reasons relied on in *Roviaro* v. *United States*, 353 U.S. 53 (1957) for requiring the prosecution to disclose the identity of the police informer support a requirement that the prosecution produce the informer as a witness at the trial when he has been used as the prominent actor in the controlled narcotics buy. In the *Roviaro* case, informer "John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for the opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package." 353 U.S. at 63-64.

Defendant was not obliged to undertake the burden and disadvantage of disclosing the materiality of the expected testimony and obtaining a court order, as required under California law, to release the informer from the county jail to testify, see 28 Ops. Cal. Atty. Gen. 59 (1956); Calif.

Code Civ. Proc. §1995; *cf. People* v. *Wilkins,* 178 Cal. App.2d 242, 245, 2 Cal.Rptr. 908 (1960) (subpena); or to suffer the additional disadvantage of having an unreliable and untrustworthy informer cast in the light of a witness for the defense. "It is no answer to say that the defense can call an informer . . . as a hostile witness . . . . He may be so undependable and disreputable that no defense counsel would risk putting him on the stand. Moreover, as a defense witness, he would be open to impeachment by the Government, his late employer. The tactical possibilities of this situation would be apparent to a prosecutor bent on obtaining a conviction . . . . And if not required to call the informer, he may place on the defense the onus of finding and calling a disreputable witness who, if called, may be impeached on all collateral issues favoring the defense. The effect on law enforcement practices need hardly be stated: the more disreputable the informer employed by the Government, the less likely the accused will be able to establish any questionable law enforcement methods used to convict him." *Lopez* v. *United States,* 373 U.S. 427, 445 (1963) (concurring opinion of Chief Justice Warren).

In a criminal trial, the prosecution must "shoulder the entire load". *Tehan* v. *Shott,* 382 U.S. 406 (1966). The informer was apparently in custody in the county jail (R. 127-128, 206) and should have been produced by the prosecution.

If the prosecution cannot rely on out-of-court assertions when the witness is unavailable, *Pointer* v. *Texas, supra,* it surely cannot be allowed to rely on the assertions and conduct of an available key witness when it has made a deliberate decision not to produce him at the trial. "The Government which prosecutes an accused has the duty . . .

to see that justice is done. Jencks v. United States, 353 U.S. 657, 671 . . . (1957). The missing . . . [informer] was . . . a key figure in this prosecution, and it was the government's duty to expend every reasonable effort to produce him at trial. His absence, without satisfactory explanation, makes necessary the grant of a new trial." *United States* v. *Clarke,* 220 F.Supp. 905, 909 (E.D. Pa. 1963); see *Lopez* v. *United States,* 373 U.S. 427, 444-445 (1963) (concurring opinion of Warren, C.J.); *United States* v. *Ramsey,* 220 F.Supp. 86 (E.D. Tenn. 1963); Note, *Prosecution Required to Produce Alleged Entrapper as Witness at Trial,* 64 Colum. L. Rev. 359 (1964).

B. The Confrontation Question Is Properly Before the Court.

At the close of the prosecution's case, defendant moved to dismiss. In support of the motion, his attorney stated in part that: "The circumstances, I believe, are quite strange and unusual. The informant, who is in custody in this county, has not been called to testify. * * * I feel that this is the type of investigation, the type of error—not calling [him]—that seems to me there is something very wrong there; that there's so much reasonable doubt that I don't believe this case should be allowed to proceed further." (R. 206, 207.)

The trial court denied the motion, relying heavily on the testimony about the informer, *e.g.,* "I have no doubt that the contact was made. The two bindles are here. Agent Lee says they were turned over to him by [the informer] after the contact." (R. 208.)

Defense counsel's motion was based on an apt assumption of what the law should be. At the time, however, and

on March 23, 1965, when the hearing on this case was held in the District Court of Appeal and all the briefs had been filed, the California right of confrontation was only statutory, Calif. Pen. Code §686(3), and was not recognized as a constitutional right in the California courts. *E.g.*, *People* v. *Purcell*, 22 Cal.App.2d 126, 131, 70 P.2d 706 (1937). Cases in the United States Supreme Court, particularly *West* v. *Louisiana*, 194 U.S. 258, 262 (1904), had "stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply." *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). On the specific question presented here, the California District Court of Appeal, First Appellate District, had ruled in another case that the prosecution had no obligation to produce the informer it had used in a narcotics case as a witness at the trial. *People* v. *Render*, 181 Cal.App.2d 190, 195, 5 Cal.Rptr. 236 (1960). See also *People* v. *Brooks*, 234 Cal.App.2d 662, 678, 44 Cal.Rptr. 661 (1965).

On April 5, 1965, however, the United States Supreme Court decided *Pointer* v. *Texas*, 380 U.S. 400 (1965). The *Pointer* case held that "the statements made in West and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against encroachment.'" 380 U.S. at 406, quoting from *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964).

The decision of the District Court of Appeal was filed May 24, 1965. (R. 257.) There were only 15 days thereafter within which to petition for a rehearing. Calif. Rule of Court No. 27(b). A losing appellant is not required to file a futile petition for rehearing in the court that ruled against him and, with additional time, may petition directly for a hearing in the California Supreme Court. See Calif. Rule of Court Nos. 28-29.[18] Under California procedure, when a petition for hearing is granted, the opinion of the District Court of Appeal is superseded and the California Supreme Court takes over the entire case and is empowered to decide and has not hesitated to decide a case on new grounds. See, e.g., *People* v. *Cahan,* 44 Cal.2d 434, 282 P.2d 905 (1955), superseding decision of the District Court of Appeal reported in 274 P.2d 724 (1954). A petition for rehearing in the instant case also would have been particularly futile because the same judges that decided the case rule adversely on the confrontation issue in another case only two days later. *People* v. *Brooks,* 234 Cal.App.2d 662, 678, 44 Cal.Rptr. 66 (1965). Defendant's counsel did not see the *Pointer* case until June 15, 1965 when he was preparing defendant's petition for hearing to the California Supreme Court. See Cert. Rec. item 23, p. 3, n. 3. Finally, it was not until November 1965 that the California Supreme Court made clear that the scope of the new federal right of confrontation was an open question. See *People* v. *Aranda,* 63 Cal.2d 518, 530, n. 8, 47 Cal.Rptr. 353, 407 P.2d 265 (1965).

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[18] If the defendant wants to challenge incorrect statements or omissions of "material facts" in the District Court of Appeal or its failure to consider "substantial legal issues raised in the briefs," he should petition the District Court of Appeal for a rehearing as to those challenges. Calif. Rule of Court No. 29(b). Neither of such grounds was present here.

The first meaningful occasion that the new federal question of confrontation could have been presented to the California courts was in the petition for hearing to the California Supreme Court. It was squarely so presented. (Cert. Rec. item 23, pages 3-4, 17-21.) Respondent filed no answer to the petition on procedural or other grounds. Given California's tradition that defendants in criminal cases should have full opportunity to raise their claims, *e.g.*, *People* v. *Kitchens,* 46 Cal.2d 260, 262-263, 294 P.2d 17 (1956), respondent would most certainly have lost an argument that defendant's claim was not properly before the court. Furthermore, respondent in its brief in opposition to the petition for a writ of certiorari discussed the confrontation question on the merits and raised no claim that the question was not properly presented.

In summary, the new federal question of confrontation was raised at the earliest and only meaningful opportunity in the state court proceedings that it could have been raised. The confrontation question is therefore properly before this Court. *E.g., Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 320 (1930) (federal question first raised in petition for rehearing in state court because of a change in the law); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930) (raising federal question in the petition for rehearing was timely "since it was raised at the first opportunity"); see *Great Northern Rwy. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 366-367 (1932); *Cicenia* v. *La Gay,* 357 U.S. 504, 507, n. 2 (1958).

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the District Court of Appeal should be reversed with directions to reverse the judgment of the trial court.*

Respectfully submitted,

MICHAEL TRAYNOR
Counsel for Petitioner
By appointment pro hac vice

October 13, 1966.

* In *Douglas* v. *California*, the writ of certiorari had also been granted to the California Supreme Court, 368 U.S. 815 (1961) but the District Court of Appeal, whose judgment was in issue, was ordered to grant the relief there necessary. 372 U.S. 353, 358 (1963).

Certificate of Service by Mail by Attorney

MICHAEL TRAYNOR certifies that he is an active member of the State Bar of California and the appointed counsel for petitioner in this case; that his business address is 333 Montgomery Street, San Francisco, California; that he served a copy of the foregoing Brief for the Petitioner on the State of California pursuant to Rule 33 by placing the copy in an envelope and then sealing the envelope and depositing it in a United States post office or mail box on October 18, 1966, at San Francisco, California, with first class postage prepaid, addressed to counsel of record at his post office address as follows:

HONORABLE THOMAS C. LYNCH
Attorney General of California
6000 State Building
San Francisco, California 94102.
Attention: Assistant Attorney General
Albert Harris.

MICHAEL TRAYNOR

APPENDIX A.

California Cases From People v. Parham, 60 Cal.2d 378 (1963) to the Present That Dismiss Violations of the United States Constitution as Nothing More Than Harmless Error

In general, the cases included in the following summary are only those cases in which a California appellate court has affirmed a conviction after expressly holding that a violation of the United States Constitution occurred but that the violation could be dismissed as harmless. In general, the following types of cases have been excluded: (1) Cases in which the appellate court finds no violation but assumes that if one occurred it was harmless. *E.g., People* v. *Jefferson,* 230 Cal.App.2d 151, 157, 40 Cal.Rptr. 715, 719 (1964). (2) Cases that uphold police conduct even though a federal court might hold otherwise. *E.g., People* v. *Corrao,* 201 Cal.App.2d. 848, 20 Cal.Rptr. 492 (1962) (landlady's consent to search.) Compare *Chapman* v. *United States,* 365 U.S. 610 (1961) (defendant not bound by landlord's consent.) See generally Manwaring, *California and the Fourth Amendment,* 16 Stan. L. Rev. 318 (1964). (3) Cases that dismiss violations of federal constitutional rights sub silentio without a reported opinion. Calif. Rule of Court No. 976 (court rule in effect since January 1, 1964 that permits or requires non-publication in certain cases.)

It bears noting also that most of the summarized cases involve violations of and conduct deemed by the appellate courts to have been proscribed by *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) as followed in *People* v. *Dorado,* 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, *cert. denied,* 381 U.S. 937, 946 (1965); *cf. Johnson* v. *New Jersey,* —— U.S. —— (1966). These cases will be California's blueprint for evasion of *Miranda* v. *Arizona,* —— U.S. —— (1966) if the notion is upheld that a violation of the United States Constitution can be dismissed as nothing more than harmless error.

Admission of Unconstitutionally Seized Evidence in Violation of Mapp v. Ohio, 367 U.S. 643 (1961)

Citation	Crime Charged	Description of unconstitutionally seized evidence
People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1964)	robbery	check brutally choked and clubbed out of the defendant.
People v. Cooper, 234 Cal.App.2d 587, 44 Cal. Rptr. 483, 492 (1965) (the instant case)	sale of heroin	brown sack paper resembling brown sack paper in which bundles were wrapped.
People v. Bustillos, 237 Cal.App.2d 554, 47 Cal.Rptr. 283, 285-286 (1965)	possessing heroin for sale	a large quantity of narcotics and narcotic paraphernalia.
People v. Thomsen, 239 A.C.A. 78, 85-86, 48 Cal.Rptr. 455 (1965)	robbery and conspiracy	personal notations seized from sewn-up pocket that bore name of robbed jewelry store.
People v. Evans, 340 A.C.A. 301, 49 Cal. Rptr. 501 (1966)	grand theft, violation of weapons law, two counts of burglary	stolen property illegally seized from defendant's apartment was prejudicial as to one count of burglary but not on other charges.
In re Shipp, 62 Cal.2d 543, 43 Cal. Rptr. 3, 5-6, 399 P.2d 571 (1965)	murder	articles belonging to murder victim; habeas corpus judgment denying relief from conviction of murder affirmed on alternative grounds of harmless error and unavailability of collateral attack.
People v. Helms, 242 A.C.A. 528, 531-532, 536-537 (1966)	robbery, burglary, and assault	stolen electronic unit.

Admission of Unconstitutionally Obtained Statements in Violation of Escobedo v. Illinois, 378 U.S. 478 (1964)

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Hall, 62 Cal.2d 104, 41 Cal. Rptr. 284, 288, 396 P.2d 700 (1964)	murder	statement that defendant had washed shoes shown to be bloody; conviction reversed on other grounds, not violation of Constitution.
People v. Finn, 232 Cal.App.2d 422, 42 Cal.Rptr. 704, 707-08 (1965)	possession of marijuana	admission that defendant had resided in house and used bathroom where marijuana was found.
People v. Soto, 233 Cal.App.2d 437, 42 Cal.Rptr. 799, 803-04 (1965)	robbery	exculpatory statement that the substance on defendant's shirt was hot sauce, not blood and that he had found stolen watch.
People v. Saldana, 233 Cal.App.2d 24, 43 Cal.Rptr. 312, 317-18 (1965), *cert. denied*, —— U.S. ——	rape	that defendant had worn identified clothes on the night victim was raped and explanations of his recent facial scratches.
People v. Reid, 233 Cal.App.2d 163, 43 Cal.Rptr. 379, 387-388 (1965), *cert. denied*, 382 U.S. 995	attempted grand theft of steer parts	admission that defendant had gone to the Gorman area armed with a rifle and had taken parts of a steer allegedly shot by codefendant.
People v. Jack, 233 Cal.App.2d 446, 43 Cal.Rptr. 566, 575-76 (1965)	forgery of prescription to dangerous drug	statements showing consciousness of guilt and admissions of prior similar offenses.
People v. Nelson, 233 Cal.App.2d 440, 43 Cal.Rptr. 626, 628-629 (1965), *cert. denied*, —— U.S. ——	rape	exculpatory statements, description of location where pants might be found, and admission of lying to police.
People v. Beverly, 233 Cal.App.2d 702, 43 Cal.Rptr. 743, 752-53 (1965)	murder	admission that defendant had stabbed the victim coupled with claim of self-defense.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Hillery, 62 Cal.2d 692, 44 Cal. Rptr. 30, 41-43 (1965)	murder	conflicting exculpatory statements.
People v. Estrada, 234 Cal.App.2d 136, 44 Cal.Rptr. 165, 180-81 (1965)	narcotics possession	statements attempting to explain needle marks as burns.
People v. Woods, 234 Cal.App.2d 186, 44 Cal.Rptr. 187 (1965)	robbery	admission that defendant had driven to victim's home.
People v. Fisher, 234 Cal.App.2d 189, 44 Cal.Rptr. 302, 305-06 (1965)	robbery	false alibi.
People v. Haley, 234 Cal.App.2d 444, 44 Cal.Rptr. 346, 352-54 (1965)	murder	admissions that the gun was in defendant's hand and went off; contradictory versions of the shooting.
People v. Cooper, 234 Cal.App.2d 587, 44 Cal.Rptr. 483, 494-95 (1965) (the instant case)	sale of heroin	admission to chewing a marijuana cigarette wrapped in brown paper.
People v. King, 234 Cal.App.2d 423, 44 Cal.Rptr. 500, 507 (1965), *cert. denied*	possession of marijuana	admissions to prior use of marijuana, of knowledge of visitor's narcotic activities, and that defendant had "a pretty good idea" of the nature of contraband seized by the police.
People v. Ford, 234 Cal.App.2d 480, 44 Cal.Rptr. 556, 564-65 (1965)	unlawful taking and driving of auto	second confession.
People v. Brooks, 234 Cal.App.2d 662, 44 Cal.Rptr. 661, 677-78 (1965)	possession of marijuana and heroin	reversal of three convictions on associated counts of possession of heroin and marijuana and sale of marijuana because of erroneous admission of confession and incriminating statements did not require reversal on these two other counts.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Ross, 234 Cal.App.2d 758, 44 Cal.Rptr. 722, 725-27 (1965), *cert denied*, —— U.S. ——	rape	alibi.
People v. Starkey, 234 Cal.App.2d 822, 44 Cal.Rptr. 738, 743 (1965)	auto theft and burglary	alibi statement used to impeach.
People v. Robinson, 62 Cal.2d 889, 44 Cal.Rptr. 762, 766-67 402 P.2d 834 (1965)	forgery	exculpatory statement that apparent instrumentalities of the crime of forgery had been purchased from "Blackie."
People v. Daboul, 234 Cal.App.2d 800, 44 Cal.Rptr. 744, 746 (1965)	burglary	conflicting exculpatory statements.
People v. Bazaure, 235 Cal.App.2d 21, 44 Cal.Rptr. 831, 838 (1965), *cert. denied*, —— U.S. ——	murder	exculpatory and inconsistent statements.
People v. Wozniak, 235 Cal.App.2d 243, 45 Cal.Rptr. 222, 229-231 (1965)	burglary	admissions to knowledge of whereabouts of stolen property.
People v. Nye, 63 Cal.2d 166, 45 Cal.Rptr. 328, 333-336, 403 P.2d 736 (1965), *cert. denied*, —— U.S. ——	murder	admissions of theft from victim's house, alibi, and inconsistent stories.
People v. Williams, 235 Cal.App.2d 389, 45 Cal.Rptr. 427, 433-435 (1965)	robbery	admissions to taking victim's property; denials of force or fear.
People v. Mills, 235 Cal.App.2d 662, 45 Cal.Rptr. 508, 511 (1965)	possession of heroin	admissions of use of heroin and unsatisfactory explanations of possession.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Bishop, 235 Cal.App.2d 658, 660-661, 45 Cal.Rptr. 533, 535-536 (1965)	sale of marijuana	admissions of prior and current use of marijuana.
People v. Propp, 235 Cal.App.2d 619, 45 Cal.Rptr. 690, 702-05 (1965)	robbery, conspiracy; possession of prohibited weapons	incriminating admissions not amounting to a confession.
People v. Du Bont, 235 Cal.App.2d 844, 45 Cal.Rptr. 717, 720 (1965)	receiving stolen property	contradictory and evasive statements to police.
People v. Green, 236 Cal.App.2d 1, 45 Cal.Rptr. 744, 748 (1965)	murder	purported confession followed by denials.
People v. Dozier, 236 Cal.App.2d 944, 45 Cal.Rptr. 770, 773-774 (1965)	robbery and assault	admissions that defendant had contacted victim and exculpatory statements.
People v. Polite, 236 Cal.App.2d 85, 45 Cal.Rptr. 845, 849-850 (1965)	robbery and kidnapping	concession that if victim said "I was there, I must have been there."
People v. Anderson, 236 Cal.App.2d 419, 46 Cal.Rptr. 1, 5-9 (1965)	robbery	"I tried, I tried to get some money. The gun I had got Friday night" and similar statements constituting admissions on robbery charge and confession on firearm charge.
People v. De Leon, 236 Cal.App.2d 530, 46 Cal.Rptr. 241, 246 (1965)	burglary	admissions.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Sheridan, 236 Cal.App.2d 667, 670-671 46 Cal.Rptr. 295, 297-298 (1965)	possession of heroin	second confession.
People v. Gurule, 236 Cal.App.2d 847, 46 Cal.Rptr. 459, 463 (1965)	burglary	defendant Gurule's admissions to presence at scene of crime and preliminary discussions and defendant Gonzales' confession as to Gurule.
People v. Jacobson, 63 Cal.2d 319, 46 Cal.Rptr. 515, 405 P.2d 555 (1965), *cert. denied*, —— U.S. ——	murder	two of ten confessions.
People v. Cotter, 63 Cal.2d 386, 46 Cal.Rptr. 622, 405 P.2d 862 (1965)	murder	last three of seven confessions.
People v. Cully, 236 Cal.App.2d 769, 46 Cal.Rptr. 644, 650 (1965)	attempted burglary	second confession.
People v. Barry, 237 Cal.App.2d 154, 46 Cal.Rptr. 727 (1965)	grand theft	exculpatory statements used to impeach.
People v. Mathis, 63 Cal.2d 416, 46 Cal.Rptr. 785, 796, 406 P.2d 65 (1966)	murder	exculpatory statement used to show construction of elaborate falsehood.
People v. Garrow, 237 Cal.App.2d 439, 47 Cal.Rptr. 24, 27-28 (1965)	lewd conduct with child	admission that defendant might have been on premises where attack occurred.
People v. Luher, 63 Cal.2d 464, 47 Cal.Rptr. 209, 214-16, 407 P.2d 9 (1965).	robbery, conspiracy, and murder	first defendant's statements that he "could think of a lot better place to hide the gun" and other admissions.